



Comptroller General  
of the United States

Washington, D.C. 20543

61020c

## Decision

**Matter of:** Dunlap, Abbot, Chalco Corporation

**File:** B-257379

**Date:** June 20, 1994

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### DECISION

Dunlap, Abbot, Chalco Corporation protests the refusal of the Small Business Administration (SBA) to issue a certificate of competency (COC) in connection with request for proposals No. DAAJ09-92-R-0932, issued as a small business set-aside by the United States Army Aviation and Troop Command, Department of the Army, for aviation ground power units. The protester contends that the denial of a COC was based on bad faith actions by the contracting officer and the SBA's failure to consider vital information bearing on the firm's responsibility.

We dismiss the protest because our Office generally does not consider challenges to the SBA's failure to issue a COC.

In March 1994, after completion of a pre-award survey, the contracting officer determined that the protester, the low-priced offeror, was nonresponsible in the areas involving its technical, production, and financial capabilities, all of which were deemed unsatisfactory for the performance of the contract. Pursuant to the protester's request, and in accordance with Federal Acquisition Regulation § 19.602-1, by letter dated March 30, the contracting officer referred the matter of the protester's responsibility to the SBA for review under its COC procedures.

In this letter, the contracting officer stated that the protester's technical, production, and financial capabilities were considered inadequate for the performance of the contract. The contracting officer noted that after completion of the pre-award survey, the protester submitted a corporate guaranty agreement which was forwarded to the pre-award survey team for review. The team requested that the protester correct some errors which were identified in

the agreement. The team stated that at that time, it would reevaluate the protester's financial capability and issue an amendment to the pre-award survey report.<sup>1</sup> The contracting officer reported that the team nevertheless believed that the reevaluation of the protester's financial capability still would result in a no-award recommendation. Finally, according to the referral letter, the contracting officer submitted the following documents to the SBA: the protester's proposal, a copy of the negative pre-award survey report, a set of drawings, the contracting officer's nonresponsibility determination, and the corporate guaranty agreement.

By letter dated April 5, the SBA advised the protester that in determining whether to issue a COC, it would independently evaluate both its financial and technical capabilities to determine whether the firm could perform the contract. The SBA requested informational submissions from the protester (by April 13) and emphasized that the burden of proof concerning the protester's competency remained on the protester.

By letter dated April 29, the SBA notified the protester that after thoroughly reviewing the information provided, it did not have sufficient grounds to reverse the contracting officer's nonresponsibility determination and hence, would not issue a COC.<sup>2</sup> Specifically, the SBA determined that the protester's past and current performance of its government contracts was considered less than satisfactory. The SBA also determined that the protester's interim financial statements for the previous 11-month period showed a small net worth base and a negative working capital base. The SBA noted that the protester experienced a 25 percent net loss for the period, and that while the protester recently filed a voluntary petition for bankruptcy

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<sup>1</sup>By letter dated April 6, the contracting officer notified the SBA that the pre-award survey team was no longer reevaluating the protester's financial capability since the matter was for review by the SBA under its COC procedures.

<sup>2</sup>In response to a request from the protester, the agency extended the time the SBA had to process the COC referral in order to afford the protester additional time to submit supplemental documentation to the SBA in support of its claim of responsibility. However, there is no evidence in the record that the protester submitted any additional information for consideration by the SBA prior to its denial of a COC.

reorganization, there was no confirmation in the record that a reorganization plan had been submitted to, and approved by, the bankruptcy court. The SBA stated that without a reorganization plan, it was not assured that the firm had sufficient resources or commitments of cash or credit in amounts adequate to perform the contract and to satisfy its other commitments. On May 11, the contracting officer awarded a contract to Engineered Air Systems, Inc.

The protester argues that the contracting officer acted in bad faith in making the referral to the SBA. In this regard, the protester believes that the contracting officer adversely influenced the SBA, for example, by submitting a copy of the negative preaward survey report to the SBA for review and by referring to an opinion of the preaward survey team that reevaluation of the protester's financial capability still would result in a no-award recommendation. The protester also argues that the SBA failed to consider vital information bearing on the firm's responsibility. Specifically, the protester questions whether the contracting officer submitted a copy of the corporate guaranty agreement to the SBA. The protester also states that it was not scheduled to submit its bankruptcy reorganization plan until May 17, almost 3 weeks after the SBA declined to issue a COC.

Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1988), the SBA, not our Office, has the conclusive authority to review a contracting officer's determination that a small business is not responsible. Accordingly, our Office limits review of the denial of a COC to instances in which the protester's submission indicates that the SBA's actions on a referral may have been taken fraudulently or in bad faith or that the SBA failed to consider vital information bearing on the protester's responsibility. Joanell Laboratories, Inc., B-242415.16, Mar. 5, 1993, 93-1 CPD ¶ 207. Such circumstances are not present here.

Specifically, the protester alleges bad faith by the contracting officer in submitting to the SBA a copy of the negative pre-award survey report and by referring to an opinion of the pre-award survey team that reevaluation of the protester's financial capability would not result in a recommendation to make an award to the protester. We point out, however, that the contracting officer properly submitted to the SBA the negative pre-award survey report,

which served as the basis for the contracting officer's nonresponsibility determination, so that the SBA could use this document as the basis for its review of the contracting officer's determination. We further believe that the contracting officer's reference to the opinion of the pre-award survey team does not constitute bad faith.

Moreover, allegations concerning the SBA's "failure to consider vital information" involve our limited consideration of the contracting officer's failure, whether inadvertent or intentional, to provide all information bearing on a COC matter to the SBA, thus preventing the SBA from making a reasonable judgment on the basis of all relevant facts. Joanell Laboratories, Inc., supra. In these circumstances, the contracting officer's failure to provide all information is considered inconsistent with that official's statutory duty to refer "the matter for a final disposition" to the SBA. 15 U.S.C. § 637(b)(7)(A).

Here, the record shows that the SBA declined to issue a COC to the protester because its past and current performance of government contracts was considered less than satisfactory--a determination which has not been challenged by the protester. The SBA also declined to issue a COC because of the protester's lack of financial resources and credit, a determination which the SBA states was based on a review of the protester's interim financial statements for the previous 11-month period and its filing of a voluntary petition for bankruptcy reorganization for which no reorganization plan, at the time the COC referral was processed, had been submitted to, and approved by, the bankruptcy court.

While the SBA makes no specific reference to consideration of the protester's corporate guaranty agreement, there is no evidence in the record that any failure by the SBA to consider this document was as a result of the contracting officer's failure to submit this document to the SBA. Rather, the record clearly shows that this document, as well as four other documents, was submitted as an attachment to the contracting officer's referral letter to the SBA.

Moreover, the protester concedes that it replaced the original corporate guarantor with another corporate guarantor, but did not provide this new information to the SBA for consideration.<sup>3</sup> Therefore, even if the SBA did not consider the original corporate guaranty agreement, the protester was not prejudiced since, by its own admission, it substituted, without notice, another corporate guarantor for the original corporate guarantor, thus making any information regarding the original corporate guarantor irrelevant to a determination of the protester's financial responsibility.

In addition, consistent with the SBA advice that it was the protester's burden to establish its competency, we believe that it was incumbent upon the protester to timely inform the SBA of the timeframe for submission and approval of its bankruptcy reorganization plan since this information was in its possession. The SBA could not be expected to wait indefinitely for the protester to establish its financial capability.

In any event, the protester provides no basis for our Office to review the SBA's denial of a COC because of the protester's less than satisfactory past and current contract performance. Thus, even if a corporate guaranty agreement remedied the protester's lack of financial capability, the protester still had performance problems, an additional basis as identified by the SBA for declining to issue a COC.<sup>4</sup>

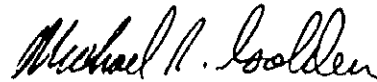
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<sup>3</sup>The protester complains that the contracting officer proceeded to award the contract after a COC was denied without affording the protester an opportunity to submit the second corporate guaranty agreement as evidence of its financial capability. The record shows that almost two weeks elapsed from the time the COC was denied and the award was made. During this time, the protester never submitted any additional information to the contracting officer as a basis for reconsidering his nonresponsibility determination. Under these circumstances, we do not believe the contracting officer was obligated to delay the award of the contract until the protester provided new information bearing on its financial capability. See Mid-American Eng'g and Mfg., B-247146, Apr. 30, 1992, 92-1 CPD ¶ 414; McGhee Constr., Inc., B-233763.2, Apr. 4, 1989, 89-1 CPD ¶ 352.

<sup>4</sup>In its cover letter attached to the corporate guaranty agreement, the protester refers to "[its] strength and the financial depth of [its corporate guarantor]." Clearly, the protester submitted a corporate guaranty agreement in order to correct financial, as opposed to technical and production, responsibility matters.

Therefore, we conclude that there is no evidence in the record of bad faith or that the SBA failed to consider vital information in reaching its decision not to issue a COC to the protester. We have no authority to further review the matter.

Accordingly, the protest is dismissed.<sup>5</sup>



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<sup>5</sup>The protester also alleged various improprieties concerning the evaluation of proposals and the award decision. However, since the protester was denied a COC by the SBA, it was not eligible for award under any circumstances. Therefore, the protester is not an interested party for purposes of filing a protest challenging the evaluation of proposals and the award decision. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1994); see The Swanson Group, Inc., B-249631, Aug. 10, 1992, 92-2 CPD ¶ 93.